INDEX

	Page
Statement	1
Argument	6
Conclusion	16
Appendix A	17
Appendix B	19
Appendix C	23

CITATIONS

Cases:

Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129	9
City of New York, et al. v. *United States*, Nos. 1141 and 1146, O.T. 1967 (decided April 22, 1968)	9
Clinton Bridge, The, Wall. 454	15
Hodges v. *Snyder*, 261 U.S. 600	15
Mills v. *Green*, 159 U.S. 651	15
Lupton Mfg. Co. v. *United States*, 388 U.S. 457	9
Pennsylvania v. *Wheeling and Belmont Bridge Co.*, 18 How. 421	13, 14, 15
Pioneer National Title Ins. Co. v. *United States*, 385 U.S. 1022	9
Swift & Co. v. *United States*, 276 U.S. 311	7, 9
United States v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, affirmed *sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580	9
United States v. *Borden Co.*, 347 U.S. 514	9
United States v. *First National Bank and Trust Company of Lexington*, 376 U.S. 665	2, 3, 12
United States v. *Klein*, 13 Wall. 128	15
United States v. *Philadelphia National Bank*, 374 U.S. 321	16
United States v. *United Shoe Machinery Corp.*, No. 597, this term	16

Statutes and Rule:
Act of August 31, 1852 10
Bank Merger Act of 1966, 80 Stat. 7, 10; 12 U.S.C. (Supp. II) 1828 ..... 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15, 16
Sherman Act, Section 1, 15 U.S.C. 1 .. 2, 3, 10, 11, 12, 14, 16
Section 2, 15 U.S.C. 2 ..... 2, 4, 5, 6, 9, 10, 11, 13, 14, 16
Rule 24 (a) and (b) of Federal Rules of Civil Procedure 5, 8
Congressional and Miscellaneous:
112 Cong. Rec. 2333 (daily ed.) 10
112 Cong. Rec. 2334 (daily ed.) 10
112 Cong. Rec. 2358 (daily ed.) 10
H. Rep. No. 1221, 89th Cong., 2d Sess., 4 10
Advisory Committee Note To Amended Rules of Civil Procedure, F.R.D. 111 8
D. Shapiro, *Some Thoughts on Intervention before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721 8

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1269

CENTRAL BANK AND TRUST CO., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 1270

DAGES I. BOYLE, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

These are direct appeals from a consent judgment entered in a government civil antitrust action challenging a bank merger in Lexington, Kentucky. The

merger combined First National Bank & Trust Company of Lexington, Kentucky ("First National") and Security Trust Company ("Security") to form First Security National Bank & Trust Company of Lexington, Kentucky ("First Security"). The day of the merger (March 1, 1961), the United States filed a complaint charging that it was a combination in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, and a combination and an attempt to monopolize in violation of Section 2 of that Act.

1. First National had been the largest of six commercial banks in Fayette County, Kentucky, holding approximately 40 percent of the total assets, deposits, and loans in the county (*United States* v. *First National Bank and Trust Company of Lexington*, 376 U.S. 665, 668). Security was the fourth largest, with approximately 13 percent of the total assets, deposits, and loans (*ibid.*). In the trust business they had been first and second, together holding 79.62 percent of all trust accounts, which represented, in dollar value, 94.82 percent of all trust assets held by the county's banks (*id.* at 669).

After trial, the district court (Judge Ford) dismissed the complaint (208 F. Supp. 457). The court found that Fayette County, Kentucky, was the relevant geographic area in which to measure the anticompetitive effects of the merger and that commercial banking was the relevant product market (*id.* at 460). But it found no predatory conduct and accepted expert testimony that the merger would not lessen banking competition in the county.

On appeal, this Court reversed and remanded (376 U.S. 665), holding that the merger violated Section 1 because the merging banks had competed with one another in the commercial banking market in Fayette County (*id.* at 671–672). The Court did not reach the questions whether the merger also violated Section 2 (*id.* at 673) and whether trust department services constituted a separate relevant product market (*id.* at 667, n. 3).

2. On remand, the district court, on March 18, 1965, ordered First Security to establish "a separate, competitive and independent commercial bank which shall be the equivalent of the former Security Trust Company" at the time of the merger (J.S. 20a).[1] Before the divestiture order was effectuated, Congress enacted the Bank Merger Act of 1966, 80 Stat. 7, 12 U.S.C. (Supp. II) 1828. This statute, *inter alia*, immunized against attack under any antitrust law "other than Section 2" of the Sherman Act any bank merger which, like the one involved here, was consummated prior to June 17, 1963, and had not been dissolved or terminated under an antitrust decree prior to the statute's enactment on February 21, 1966.[2]

On April 28, 1966, the government moved in the district court for an adjudication that the merger vio-

[1] Unless otherwise noted, "J.S." refers to the jurisdictional statement filed by Central Bank and Trust Company in No. 1269.

[2] "Sec. 2(a). Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not

lated Section 2 and for entry of a final judgment of divestiture. Judge Ford having retired, the motion came before Judge Swinford. On February 1, 1967, he denied the motion on two grounds: first, that Judge Ford's decision was the law of the case and there were no unusual circumstances warranting re-examination of the decision by a judge of coordinate jurisdiction; and second, that "Congress by the enactment of the Bank Merger Act" intended "to immunize this particular merger from all further attacks * * *" (J.S. 15a, 17a–19a; 263 F. Supp. 268, 269–270).

On March 31, 1967 the government filed a notice of appeal to this Court. Before the record was docketed, settlement negotiations began. On August 1, 1967, the parties submitted a proposed consent judgment (J.S. 10a–14a) for the district court's approval under a stipulation[3] providing that the decree could be entered if the government did not withdraw its consent within 30 days (later extended 40 additional days (J.S. 9a)). The stipulation also provided for dismissal of the appeal upon entry of the judgment.

The proposed decree enjoined First Security from serving for ten years as trustee or custodian of any non-testamentary trust account created after the judg-

---

effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2)." 80 Stat. 7, 10; 12 U.S.C. (Supp. II) following 1828.

[3] The stipulation is reprinted as Appendix A to this Motion, pp. 17–18, *infra*.

ment (J.S. 12a at ¶ V).[4] This restriction could be removed after January 1, 1969, but only if First Security could then establish that in the preceding year it acted as trustee of either less than 25 percent by number or less than 50 percent by dollar value of the total assets of all trust accounts held by commercial banks in the county (*id.* at ¶ VI). The judgment also enjoined First Security from acquiring control over or merging with any other commercial bank in Fayette County for ten years (*id.* at ¶ III); and from establishing for a period of five years any additional branch banking office in the county if First Security would thereby own or control more than one-third of the total number of banking offices there (*id.* at ¶ IV).

3. On September 15, 1967, the appellants here, Central Bank & Trust Company ("Central"), a competing bank in Lexington, and Dages I. Boyle, a stockholder in the merged banks, moved to intervene as of right under Rule 24 (a) and (b) of the Federal Rules of Civil Procedure. They urged the court to reconsider its decision that Section 2 had not been violated and to reopen the record for the taking of new evidence. They contended that the public interest required divestiture, which the proposed judgment did not achieve, and that the Bank Merger Act of 1966 was an unconstitutional encroachment by Congress upon the judicial function that deprived the intervenors of rights vested under the original decree. Appellants filed sup-

[4] An exception was provided for those trusts, the settlor of which was an officer, director, advisory director, or employee of First Security.

porting briefs and presented their views to the district court at a hearing on October 2, 1967.

4. On December 29, 1967, the district court entered the consent judgment. It allowed appellants to intervene (J.S. 6a) "to be heard in opposition to the proposed final judgment." The court said that it "seriously question[ed]" the government's "judgment in not permitting this case to go to a final decision by the Supreme Court" (J.S. 6a). But it also commented that it did "not question the right of the United States or any other public agency to compromise litigation in which it is involved" (J.S. 7a). The court held the Bank Merger Act of 1966 to be constitutional, and refused to reconsider its earlier ruling denying relief on the Section 2 claim (J.S. 7a–8a). In approving the proposed judgment, it stated that "[t]here has been no showing of bad faith on the part of the United States" (J.S. 8a). Under the stipulation the entry of the judgment automatically resulted in dismissal of the government's appeal to this Court (Appendix, *infra*, pp. 17–18).[5]

ARGUMENT

1. Contrary to appellants' contention (J.S. 13–15)—which they did not make before the district court—a person permitted to intervene in a government antitrust suit does not automatically acquire the power to prevent the government and the defend-

[5] Four successive orders, two entered by Mr. Justice Stewart and two by the district court, had extended the United States' time for docketing to and including January 27, 1968.

ants from settling the case through a consent judgment. Here appellants sought and were granted intervention solely to object to the adequacy of the relief provided by the consent judgment and to urge that the Bank Merger Act is unconstitutional. On appeal from the district court's acceptance of the consent judgment, they may argue that, in the light of all the circumstances, the judgment was not an appropriate method of terminating the litigation, and that the district court therefore should have rejected it. (As we show in point 2, below, the consent judgment here represented a reasonable accommodation of conflicting positions and uncertainties, and thus properly was approved.) But intervention did not allow them to control the original parties' disposition of the case.

Even in a private suit, one plaintiff cannot bar another from settling his controversy with the defendant. Whatever dispute the non-consenting plaintiff has with the defendant continues to be litigated, but the settled part of the case must be dismissed. *A fortiori,* permitting a third person to intervene as a co-plaintiff in a government antitrust suit would not bar the government and the defendants from settling the case on whatever terms they deem appropriate. For the authority to prosecute such cases lies with the Attorney General, not with the intervenors; and such authority includes the right to settle. *Swift & Co.* v. *United States,* 276 U.S. 311, 331–332. To allow a private intervenor to veto a consent judgment would elevate his private interest over the public interest represented by the Attorney General. Once the United States

concludes that a particular settlement is preferable to continued litigation of a particular suit and the district court enters a decree embodying the settlement, this public interest must prevail over the narrower personal interests of the intervenor in continuing the government's suit.

Rule 24(a) of the Federal Rules of Civil Procedure, as amended in 1966, confirms this analysis; it contemplates a limited role for intervenors in appropriate circumstances. Unlike the earlier language of the rule, which required that the applicant "is or may be bound by a judgment in the action," a would-be intervenor now needs to show only that "the disposition of the action may as a practical matter impair or impede his ability to protect [his] * * * interest" in the subject matter of the suit. This rule looks to the practical needs of an intervenor and those needs may vary markedly from case to case. Thus, as the Advisory Committee's note to the amended rule, 39 F.R.D. 111, observes, "[a]n intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." See, also, D. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721, 752–756.

In cases such as this—where a private party intervenes in proceedings directed at a proposed consent judgment in a government antitrust suit—it is especially appropriate to limit the intervenors' role, as the district court did, to presenting their views and

appealing.[6] Where an applicant for intervention objects to a proposed decree primarily on the ground that it does not serve the public interest represented by the Attorney General, and its ability to protect its private rights under the antitrust laws is not impaired or impeded, intervention normally is denied.[7] But if the district court permits an opponent of a proposed consent decree to intervene, such intervention properly is limited to permitting him to show how the proposal is inadequate. Such limited participation enables the intervenor fully to present his objections to the court and permits appellate review of the judgment, yet avoids the jeopardizing of the public interest that would result from giving the intervenor a veto power over the consent judgment. Cf. *Swift & Co.* v. *United States*, 276 U.S. at 331–332; *United States* v. *Borden Co.*, 347 U.S. 514, 519.

2. The court below properly approved the consent judgment. That court in 1962 had found that the merger did not violate—and the government was not entitled to relief on the basis of—Section 2 of the Sherman Act. This Court, while reversing the ruling

[6] In contrast, the original parties are estopped from appealing from the decree to which they have agreed. *Swift & Co.* v. *United States*, 276 U.S. 311, 324.

[7] Compare *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, with *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Calif.), affirmed, *per curiam, sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580; *Lupton Mfg. Co.* v. *United States*, 388 U.S. 457; *Pioneer National Title Ins. Co.* v. *United States*, 385 U.S. 1022; *City of New York et al.* v. *United States*, Nos. 1141 and 1146, O.T. 1967 (decided April 22, 1968).

that the merger did not violate Section 1, did not reach that issue. After the Bank Merger Act of 1966 eliminated Section 1 as a basis for relief, the district court expressly refused to reconsider its prior Section 2 ruling.

In these circumstances the government was presented with three alternatives. First, it could abandon any effort to obtain further relief in this case. Second, it could attempt to negotiate with the defendant for the most effective relief it could obtain by consent, given the posture of the case. Third, it could press an appeal to this Court on the Section 2 claim.

Had the government dropped its appeal, the proceeding would have been at an end and there would have been no antitrust relief; such a decision would have been wholly within the discretion of the Department of Justice. On the other hand, the probabilities of securing divestiture through appeal were unclear. Although First Security had about half the banking business in Fayette County, it was far from certain that this Court would find an unlawful monopoly. First Security's domination of trust department services in Fayette County offered a far more encouraging case. But even here the government would have had to refute legislative history which admits of an argument that Congress, in 1966, intended to excuse this merger altogether from antitrust liability.[8] More-

[8] The legislative history indicates that Congress intended to forgive this and two other bank mergers from all antitrust liability except for monopolization under Section 2 of the Sherman Act. See H. Rep. No. 1221, 89th Cong., 2d Sess., p. 4; *e.g.*, 112 Cong. Rec. 2333 (daily ed.) (Remarks of Congressman Smith); *id.* at 2334 (Remarks of Congressman Patman); *id.* at 2358 (Remarks of Congressman Ashley).

over, even a successful appeal on this latter issue would not guarantee that a total divestiture, of the sort appellants demand, ultimately would result.

In these circumstances, we submit, the district court properly approved the consent decree. Appellants urged that divestiture was necessary; they offered no other alternative to the negotiated decree. The district court, however, had twice refused—once before and once after this Court's decision under Section 1—to find the violation of Section 2 that would be the legal requisite to a forced divestment. Without such a finding the district court could hardly have insisted upon divestiture, an action to which the defendants obviously would not consent. Indeed, the intervenors, in resting their argument primarily on the claim that the 1966 legislation is unconstitutional, necessarily recognized that a finding of illegality was an essential requisite to the ultimate relief they sought.[9]

Thus the choice before the district court was to approve this decree or to force upon the Attorney General the dilemma of either dropping the case without relief, or investing substantial resources in an appeal that offered far from a certainty of ultimate divestiture. The proffered decree offered substantial relief, once it was recognized that in the immediate circumstances divestiture was simply unavailable. It fully forbade growth by acquisition. It barred any significant expansion into new offices. In the trust area—the aspect of First Security's business that offered the government its best case on appeal—substantial limitations were imposed on the acquisition of new accounts. This, of course, is the focus of competition

[9] Appellants' complaints are printed as Appendices B and C, pp. 19–26 *infra*.

in the trust business, and the limitations imposed on First Security necessarily will diminish its share of Fayette County trust business.[10]

Moreover, the limitation on First Security's acquisition of new trust business may be expected to affect its position in commercial banking generally. In finding that the merger's probable competitive effect in commercial banking violated Section 1, this Court recognized (376 U.S. at 669) the significance of "the multiplicity of extra services in the trust field which the new company could offer * * *." The limitations imposed on First Security will significantly restrict this advantage over its competitors. Furthermore, the additional trust business which the competitors will be able to obtain as a result of such restrictions should enable them to attract a larger share of the banking business as well.

The criticism in the opinion of the district court of the government's action in settling the case cannot fairly be read, as appellants read it, to indicate that the court viewed the consent judgment as improper or inadequate, and was entering it solely because the government had acted in good faith. Rather, those comments are directed at the Attorney General's decision to settle this case instead of prolonging the litigation and risking the possibility of no relief through an appeal based on the Bank Merger Act's exception of Section 2 claims.

[10] The Department of Justice advised the district court that in its judgment the limitations on the trust business would eventually reduce First Security's share "to some 25 percent by number and to some 50 percent by dollar value, and we think that is an effective curb." (Transcript, Oct. 2, 1967, at p. 78.)

The district court was obviously of the view that the Section 2 point should be appealed, but it recognized that it could not compel a government appeal. In the circumstances, the district court properly terminated this protracted litigation by entering a decree which realistically offered as effective relief as was then available.

3. Section 2(a) of the Bank Merger Act of 1966 is not, as appellants urge, unconstitutional The propriety of such legislation has been clear ever since the decision in *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421.

That case was an original action in this Court where the State of Pennsylvania contended that a bridge was an unlawful obstruction to navigation of the Ohio River. This Court agreed, and directed that the bridge be elevated or destroyed. (*id.* at 429). Thereafter, but before this Court's decree was implemented, Congress adopted a statute (August 31, 1852) that explicitly "declared" the bridge "to be lawful * * *." When the defendants asserted that the new statute absolved them of the duty of compliance with the Court's decree, Pennsylvania argued (*id.* at 431)—just as appellants do here—that the statute could not "annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff."

This Court, however, rejected the argument because of two factors: (1) that the right in issue—freedom of navigation—was basically a public and not a private right; and (2) that this Court's decree had remained executory up to the time of the legislature's action (*id.* at 431):

The case before us, however, is distinguishable from this class of cases [involving solely private rights], so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of congress.

But, although this right of navigation be a public right common to all, yet, a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or, to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the unlawful interference with the enjoyment of the public right, which, as we have seen, is under the regulation of congress. Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respects the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. * * *

See also, The *Clinton Bridge*, 10 Wall. 454; *United States* v. *Klein*, 13 Wall. 128, 146; *Mills* v. *Green*, 159 U.S. 651, 655-656; *Hodges* v. *Snyder*, 261 U.S. 600, 603-604.

Had appellants secured before the 1966 Bank Merger Act a judgment for money damages, Congress, of course, could not have terminated that right by subsequently enacted legislation.[11] But the order of divestiture dealt with the public's rights under the Antitrust laws, a subject over which the Congress has plenary jurisdiction. So long as the divestiture decree remained unimplemented,[12] this jurisdiction carried

[11] The appellant in No. 1270 asserts (J.S. No. 1270, p. 23) that as a shareholder in First Security and its predecessors, the executory divestiture order gave him private rights that Congress could not disturb. However, the district court's order simply provided for a formation of a new bank, as a subsidiary of First Security, and a pro-rata "spin-off" of the subsidiary's stock to First Security's shareholders. Such a transaction would have created no additional values for the shareholders, but simply would have given each of them two stock certificates to represent precisely the same investment as had previously been represented by a single piece of paper.

[12] *Wheeling Bridge*, is not distinguishable (see J.S. No. 1270) on the ground that there the bridge, if destroyed, could immediately have been rebuilt without sanction. To be sure, the formation of First Security would not be immune had it occurred after adoption of the 1966 Act. But the Congressional determination in that Act as to which mergers it would excuse depended upon the date on which they took place. The legislative history shows (see note 8, *supra*) that Congress sought to immunize those bank mergers occurring *before* this Court's decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321.

with it ample authority to decree, as Congress did, that the public interest did not require that this particular merger be adjudged in violation of Section 1 of the Sherman Act.[13]

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
DONALD F. TURNER,
Assistant Attorney General.
HOWARD E. SHAPIRO,
DAVID S. J. BROWN,
Attorneys.

MAY 1968.

---

[13] There is no substance to appellants' claims that the decree fails to restrict growth of the trust business because it contains exceptions for inter-vivos trusts established by "advisory directors" and for testamentary trusts. If the first exception is in practice abused, or if the second results in unexpected growth, the government's retained powers of visitation (J.S. 13a at ¶ VII) and the court's retained jurisdiction (*id.* p. 14a at ¶ VII) provide ample means of securing such additional relief as may become appropriate as of a later date. Cf. *United States* v. *United Shoe Machinery Corp.*, No. 597, this Term. No present evidence of possible abuse of the "advisory director" provision was offered below, and, insofar as this record is concerned, it appears that nontestamentary accounts provide the most important aspect of First Security's trust business (Transcript, Oct. 2, 1967, at p. 78).

APPENDIX A

United States District Court, Eastern District of Kentucky

Civil No. Lex. 1426, Filed: August 7, 1967

UNITED STATES OF AMERICA, PLAINTIFF

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, DEFENDANTS

STIPULATION

It is stipulated by and between the undersigned parties, by their respective attorneys, that:

(1) The parties consent that a Final Judgment in the form attached may be filed and entered by the Court at any time after the expiration of thirty (30) days following the date of filing of this Stipulation without further notice to any party or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of thirty (30) days by serving notice thereto upon the other parties hereto and filing said notice with the Court;

(3) Plaintiff having filed on March 30, 1967, its notice of appeal to the Supreme Court of the United States, the parties hereto consent to the dismissal of

that notice of appeal upon entry of the proposed Final Judgment attached hereto;

(4) In the event plaintiff withdraws its consent hereto, this Stipulation shall be of no effect whatever in this or any other proceeding and the making of this Stipulation shall not in any manner prejudice any consenting party in any subsequent proceeding.

Dated: August 7, 1967.

For the Plaintiff:

(S) Donald F. Turner
DONALD F. TURNER,
Assistant Attorney General.

(S) Wm. D. Kilgore, Jr.
WILLIAM D. KILGORE, JR.,

(S) Charles L. Whittinghill
CHARLES L. WHITTINGHILL,

(S) William H. McManus
WILLIAM H. MCMANUS,
Attorneys, Department of Justice.

For the Defendants:

(S) Paul A. Porter

(S) Victor H. Kramer

APPENDIX B

United States District Court, Eastern District of Kentucky

Civil No. Lex. 1424

UNITED STATES OF AMERICA, PLAINTIFF

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, DEFENDANTS

PLAINTIFF-INTERVENOR COMPLAINT

Plaintiff-Intervenor, Central Bank & Trust Co., for its intervening complaint herein states as follows:

(1) Plaintiff-Intervenor, Central Bank & Trust Co., Lexington, Kentucky, is a corporation duly organized and existing under the laws of the Commonwealth of Kentucky, and is authorized to, and is, engaging in the commercial banking and trust business, and has engaged in such business in the City of Lexington, Fayette County, Kentucky, for over 25 years.

(2) The original complaint filed herein by the United States, and all amendments thereto, are hereby adopted and incorporated herein by reference.

(3) The final judgment entered by this Court on March 18, 1965, as clarified by this Court's order of April 25, 1965, was a final order from which no appeal was taken by any interested party, and said judg-

ment and order was entered pursuant to the decision of the United States Supreme Court, rendered April 6, 1964.

(4) Under the aforesaid final judgment and order of this Court, and the decision of the United States Supreme Court, rights vested in favor of a new banking association to be the equivalent of the former Security Trust Company, as well as stockholders, depositors, competitors and the public.

(5) The proposed final judgment consented to and presented to this Court for approval and entry impairs and destroys rights vested under the aforesaid judgment of this Court and the decision of the United States Supreme Court, and this Court has no jurisdiction whatsoever to enter a judgment which would, in effect, vacate the March 18, 1965 final judgment of this Court from which no appeal was taken, or can be taken. Said proposed final judgment fails in all respects to effectively restore competition to commercial banking in Fayette County, Kentucky, as it existed prior to the consolidation of First National Bank and Trust Company with Security Trust Company.

(6) The Bank Merger Act (Public Law 89–356, 80 Stat. 7) was enacted by Congress on February 21, 1966, more than 10 months after the judgment of this Court, entered on March 18, 1965, became final and nonappealable. Said Act is unconstitutional because:

(a) It encroaches upon the powers of the judiciary granted in Article III of the United States Constitution to decide cases and controversies, in that it expressly provides that certain mergers, including the merger involved in this case, are conclusively presumed not to have been in violation of Section 1 of the Act, even though the United States Supreme Court

judgment, dated April 6, 1964, that said merger is in violation of Section 1 of the Sherman Act.

(b) It denies due process of law in violation of the V[th] Amendment to the United States Constitution, in that it attempts to nullify the judgment of the United States Supreme Court and the final unappealed judgment of this Court and deprived stockholders, depositors, competitors and the public generally of rights vested under each of those judgments.

(c) It violates the due process clause of the United States Constitution because without any reasonable basis whatsoever it arbitrarily discriminates between insured banks which have merged prior to June 17, 1963, and those that merged and will merge subsequent to February 21, 1966, and between insured and uninsured banks, and between banks and other corporations in other fields of endeavor which have heretofore merged and which may hereafter merge.

(7) Plaintiff-Intervenor, Central Bank & Trust Co., has been, is, and will be adversely affected if the proposed final judgment is accepted by this Court and adopted as its own.

(8) Plaintiff-Intervenor, Central Bank & Trust Co., and the Bank of Commerce and Trust Company, of Lexington, Kentucky, and the Citizens Union National Bank & Trust Co., of Lexington, Kentucky, have heretofore requested the United States to withdraw its consent to the proposed final judgment now pending before this Court and to raise the constitutional questions and continue to prosecute the defendants herein for violation of Section 2 of the Sherman Act. The United States has declined to do so. Copies of the letters of the respective banks requesting said action on the part of the United States are attached hereto as Exhibit "A" and made a part hereof.

(9) Plaintiff-Intervenor, Central Bank & Trust Co., is not adequately represented by the plaintiff or the defendants.

WHEREFORE, Plaintiff-Intervenor, Central Bank & Trust Co., demands as follows:

1. This Court refuse to enter the proposed judgment now tendered by the plaintiff and the defendants.

2. This Court require full and complete compliance with its final judgment entered March 18, 1965, as clarified by its order entered April 29, 1965.

3. Its cost herein expended and such other relief to which it may be entitled.

Respectfully submitted,

EARL S. WILSON,
Lexington, Kentucky.
EDWIN F. SCHAEFFER,
Lexington, Kentucky.
EARL W. KINTNER,
Washington, D.C.
SIDNEY HARRIS,
Washington, D.C.

Of Counsel:
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1100 Federal Bar Building
1815 H. Street, N.W.
Washington, D.C. 20006

APPENDIX C

United States District Court, Eastern District of Kentucky

Civil No. Lex. 1424

UNITED STATES OF AMERICA, PLAINTIFF,

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, DEFENDANTS.

PLAINTIFF-INTERVENOR COMPLAINT

Plaintiff-Intervenor, Dages I. Boyle, on behalf of himself and First National Bank and Trust Company of Lexington, and Security Trust Company, for his intervening complaint herein states as follows:

(1) Plaintiff-Intervenor, Dages I. Boyle, is a citizen and resident of Fayette County, Kentucky, is a stockholder in defendant Security Trust Company, owning stock therein as appears of record on its corporate books, and is also a stockholder of First Security National Bank and Trust Company of Lexington, owning stock therein as appears of record in its corporate books and was prior to and at the time of merger of defendants a stockholder in each of said banks.

(2) The original complaint filed herein by the United States, and all amendments thereto, are hereby adopted and incorporated herein by reference.

(3) The final judgment entered by this Court on March 18, 1965, as clarified by this Court's order of April 25, 1965, was a final order from which no appeal was taken by any interested party, and said judgment and order was entered pursuant to the decision of the United States Supreme Court, rendered April 6, 1964.

(4) Under the aforesaid final judgment and order of this Court, and the decision of the United States Supreme Court, rights vested in favor of a new banking association to be the equivalent of the former Security Trust Company, as well as stockholders, depositors, competitors and the public.

(5) The proposed final judgment consented to and presented to this Court for approval and entry impairs and destroys rights vested under the aforesaid judgment of this Court and the decision of the United States Supreme Court, and this Court has no jurisdiction whatsoever to enter a judgment which would, in effect, vacate the March 18, 1965, final judgment of this Court from which no appeal was taken, or can be taken. Said proposed final judgment fails in all respects to effectively restore competition to commercial banking in Fayette County, Kentucky, as it existed prior to the consolidation of First National Bank and Trust Company with Security Trust Company.

(6) The Bank Merger Act (Public Law 89-356, 80 Stat. 7) was enacted by Congress on February 21, 1966, more than 10 months after the judgment of this Court, entered on March 18, 1965, became final and nonappealable. Said Act is unconstitutional because:

(a) It encroaches upon the powers of the judiciary granted in Article III of the United States Constitution to decide cases and controversies, in that it expressly provides that

certain mergers, including the merger involved in this case, are conclusively presumed not to have been in violation of Section 1 of the Sherman Act, even though the United States Supreme Court held in a final judgment, dated April 6, 1964, that said merger is in violation of Section 1 of the Sherman Act.

(b) It denies due process of law in violation of the Vth Amendment to the United States Constitution, in that it attempts to nullify the judgment of the United States Supreme Court and the final unappealed judgment of this Court and deprived stockholders, depositors, competitors and the public generally of rights vested under each of those judgments.

(c) It violates the due process clause of the United States Constitution because without any reasonable basis whatsoever it arbitrarily discriminates between insured banks which have merged prior to June 17, 1963, and those that merged and will merge subsequent to February 21, 1966, and between insured and uninsured banks, and between banks and other corporations in other fields of endeavor which have heretofore merged and which may hereafter merge.

(7) Plaintiff-Intervenor, Dages I. Boyle, has been, is, and will be adversely affected if the proposed final judgment is accepted by this Court and adopted as its own.

(8) Plaintiff-Intervenor, Dages I. Boyle, is not adequately represented by the plaintiff or the defendants.

WHEREFORE, Plaintiff-Intervenor, Dages I. Boyle, demands as follows:

1. This Court refuse to enter the proposed judgment now tendered by the plaintiff and the defendants.

2. This Court require full and complete compliance with its final judgment entered March 18, 1965, as clarified by its order entered April 29, 1965.

3. His cost herein expended and such other relief to which he may be entitled.

Respectfully submitted,

FRANK GINOCCHIO,
Lexington, Kentucky.
EARL W. WILSON,
Lexington, Kentucky.

Of Counsel:
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1100 Federal Bar Building
1815 H. Street, N.W.
Washington, D.C. 20006

Dated: Sept. 15, 1967.

U.S. GOVERNMENT PRINTING OFFICE 1968